Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-475–12 OF 2017

IDRUS HARUN, YAACOB MD SAM AND RHODZARIAH BUJANG JJCA

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2 MARCH 2018

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Election — Election Commission — Review of constituencies — Appeal against order for stay — Whether there were special circumstances to warrant stay of all local enquiries in State of Selangor pending appeal which respondent intended to file and which it did actually file subsequently against decision of High Court dismissing judicial review application — Federal Constitution, Thirteenth Schedule, s 4

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The respondent commenced judicial review proceedings against the applicants seeking to be granted orders of declarations and certiorari to impugn: (a) the notice dated 15 September 2016 published by the Election Commission ('the EC') pursuant to s 4 of the Thirteenth Schedule to the Federal Constitution ('the FC'); (b) the EC's proposed recommendations formulated in the process of carrying out delimitation exercise under cl (2) of art 113 of the FC which included the draft constituency; and (c) the electoral roll used to formulate the proposed recommendations. The High Court dismissed the application but allowed the respondent's oral application for all local enquiries in respect of the whole state of Selangor to be stayed pending the disposal of an appeal this court pursuant to the dismissal of its judicial review application. The applicants filed an appeal against the order for stay. Following the appeal, the applicants filed for an application seeking an interim order to set aside the decision of the judge which had stayed all local enquiries in the State of Selangor until the disposal of the respondent's appeal. According to the High Court judge, special circumstances existed to warrant a stay pending appeal. Hence the present appeal. The issues that arose was whether the High Court judge erred in holding that special circumstances existed to warrant a stay of all local enquiries in the State of Selangor pending an appeal which the respondent intended to file and which it did actually file subsequently against the decision of His Lordship in dismissing the judicial review application.

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Held, allowing prayer 1 in notice of motion:

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(1) The High Court judge only took into account the rights of the parties to the proceedings in this case. This was not a case of merely doing justice between the immediate parties to the proceedings. There was a wider interest of the democratic process, the doctrine of separation of power

A and the parties are concerned with the EC in carrying out its functions. The judge, in granting the order, was completely oblivious to the rights of the other states and electors in Peninsular Malaysia. By ordering the stay, that really threw a spanner in the entire works of the delimitation of constituencies machinery (see para 17).

B (2) There was no legal impediment for the court to grant an interim order as prayed for in this motion pending the hearing of the appeal filed by the applicants. Following the dismissal of the judicial review application, the position of the EC so far as it concerned the exercise of its functions under the FC remained unaffected as it would been in if there was no judicial review application and the impugned order to stay. It should remain that way until the disposal of the applicants' appeal. The status quo must be maintained and the EC must be allowed to proceed to conduct local enquiries in Selangor unhindered until its completion (see para 18).

D **[Bahasa Malaysia summary**

Responden memulakan prosiding semakan kehakiman terhadap pemohon-pemohon, memohon agar diberi perintah deklarasi dan certiorari untuk mempertikaikan: (a) notis bertarikh 15 September 2016 yang E diterbitkan oleh Suruhanjaya Pilihanraya ('SP') di bawah s 4 Jadual Ketigabelas Perlembagaan Persekutuan ('PP'); (b) cadangan yang dicadangkan oleh SP yang dirangka dalam proses menjalankan langkah penyempadanan bawah klausa (2) perkara 113 PP yang termasuk deraf kawasan; dan (c) daftar pemilih yang digunakan untuk merangka cadangan yang dicadangkan. Mahkamah F Tinggi menolak permohonan tersebut tetapi membenarkan permohonan lisan responden bagi semua inkuiri tempatan bagi seluruh Negeri Selangor ditangguhkan sementara menanti rayuan mahkamah ini susulan penolakan permohonan semakan kehakiman. Pemohon-pemohon memfailkan rayuan terhadap perintah penggantungan. Berikutan rayuan tersebut, G pemohon-pemohon memfailkan satu permohonan bagi perintah interim untuk mengetepikan keputusan mahkamah yang menangguhkan kesemua inkuiri tempatan di Negeri Selangor hingga pelupusan rayuan responden. Menurut hakim Mahkamah Tinggi, wujud hal keadaan khas yang mewajarkan penggantungan sementara menanti rayuan. Oleh itu rayuan ini. Isu-isu yang H timbul adalah sama ada hakim Mahkamah Tinggi terkhilaf dalam memutuskan hal-hal keadaan khas wujud untuk mewajarkan penggantungan kesemua inkuiri tempatan Negeri Selangor sementara menanti rayuan yang responden berniat untuk failkan dan sememangnya telah difailkan, selepas itu, terhadap keputusan Yang Arif hakim dalam menolak permohonan semakan I kehakiman.

Diputuskan, membenarkan permohonan 1 notis usul:

(1) Hakim Mahkamah Tinggi hanya mengambil kira hak-hak pihak-pihak dalam prosiding kes ini. Kes ini bukan sekadar keadilan pihak-pihak

langsung dalam prosiding. Terdapat kepentingan yang lebih luas proses demokratik, doktrin pengasingan kuasa dan pihak-pihak yang khuatir akan SP dalam menjalankan fungsinya. Hakim tersebut, dalam mengeluarkan perintah, tidak sedar akan hak-hak lain-lain negeri dan pengundi-pengundi di Semenanjung Malaysia. Dengan memerintahkan penggantungan, ini membaling spanar pada kesemua kerja-kerja jentera penyempadanan kawasan (lihat perenggan 17).

(2) Tiada kesan undang-undang bagi mahkamah untuk membenarkan perintah interim seperti yang dipohon dalam usul menanti perbicaraan rayuan yang difailkan oleh pemohon-pemohon. Susulan penolakan permohonan semakan kehakiman, kedudukan SP, setakat penjalanan fungsinya di bawah PP kekal tidak terjejas seolah-olah seperti tiada permohonan semakan kehakiman dan perintah penggantungan yang dipertikaikan. Ia harus kekal begini hingga pelupusan rayuan pemohon. Status quo mesti dikekalkan dan SP mesti dibenarkan untuk terus menjalankan inkuiri tempatan di Selangor tanpa halangan hinggalah penyempurnaannya (lihat perenggan 18).]

Notes

For cases on Election Commission in general, see 6(3) *Mallal's Digest* (5th Ed, 2015) paras 2191–2194.

Cases referred to

Election Commission, Malaysia v Abdul Fatah bin Haji Haron [1987] 2 MLJ 716, SC (refd)

M Kula Segaran dan satu lagi lwn Suruhanjaya Pilihan Raya Malaysia dan lain-lain [2018] 4 MLJ 111, CA (refd)

Peguam Negara Malaysia v Chan Tsu Chong & Ors [2018] 1 MLJ 409, CA (refd)

Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors [2017] 4 MLJ 656, CA (refd)

Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors; Lau Pui Keong v Tan Sri Haji Mohd Sunoh Marso & Ors; Ahmad Bahrom bin Datuk Hj Abu Bakar Titingan v Tan Sri Haji Mohd Sunoh Marso & Ors [1987] 2 MLJ 718, SC (refd)

Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors [1988] 3 MLJ 149, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 44

Elections Act 1958 s 9A

Federal Constitution arts 113, 113(2), 125(3), Thirteenth Schedule, Part II, ss 2(c), (d), 4, 5, 7, 8, 9, 10, 12

Appeal from: Application for Judicial Review No WA-25–186–10 of 2016 (High Court, Kuala Lumpur)

Amarjeet Singh a/l Serjit Singh (Suzana Atan, Alice Loke Yee Ching, Azizan Md Arshad, Shamsul Bolhassan and Nik Azrin Zairin Nik Abdullah with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.

Ambiga Sreenevasan (Lim Wei Jiet dan Latheefa Koya with her) (Daim & Gamany) for the respondent.

Idrus Harun JCA:

[1] On 19 October 2016, the respondent commenced judicial review proceedings against the applicants seeking to be granted orders of declaration and certiorari to impugn:

(a) the notice dated 15 September 2016 published by the Election Commission ('the commission') pursuant to s 4 of the Thirteenth Schedule to the Federal Constitution;

(b) the commission's proposed recommendations formulated in the process of carrying out a delimitation exercise under cl (2) of art 113 of the Federal Constitution which includes the draft constituency plan; and

(c) the electoral roll used to formulate the proposed recommendations.

[2] The High Court dismissed the said judicial review application on 7 December 2017 rejecting all four grounds that were raised to challenge the matters sought to be impugned. The grounds and the reasons for dismissing each one of them can be neatly summarised as follows:

(a) the first ground which was founded on the argument that the proposed recommendations had contravened the principles stated in s 2(c) and (d) of the Thirteenth Schedule to the Federal Constitution and resulted in malapportionment, *gerrymandering* and non-maintenance of local ties was dismissed based on binding precedent;

(b) the second ground concerning the allegation of the purported failure to use the current electoral roll for the delimitation exercise was dismissed based on the evidence adduced by the commission which demonstrated the fact that at the time the exercise was commenced, the electoral roll that was used was the current electoral roll;

(c) the third ground which turned upon the contention that the electoral roll did not have addresses of 136,272 voters was rejected as the electoral roll could not be subject to challenge by virtue of s 9A of the Elections Act 1958 and that the electoral roll without addresses was a valid roll as it contained the localities of the voters and a delimitation exercise did not

go beyond a unit of measure that was smaller than a locality of a voter; and

(d) the fourth ground which was directed on the contention that inadequate particulars were given to the stakeholders to make meaningful objections at the local enquiries was dismissed on the basis that adequate particulars were provided.

[3] The learned judge on the same day nevertheless allowed the respondent's oral application for all local enquiries in respect of the whole of the State of Selangor to be stayed pending the disposal of an appeal (which it intended to file) to this court pursuant to the dismissal of its judicial review application.

[4] On 8 December 2017, the applicants herein filed an appeal against the aforesaid order for stay. It is noteworthy that the respondent also filed a separate appeal on 8 December 2017. Following the appeal by the applicants, on 9 December 2017, this application (encl 14) was filed by the applicants seeking to be granted an interim order to set aside the decision of the learned judge which on 7 December 2017 had stayed all local enquiries in the State of Selangor until the disposal of the respondents' appeal before this court. In the court below, the reasoning of learned counsel for the respondent, in making out a case for the stay, as I understand it, was anchored on the existence of special circumstances that would warrant such stay which he described clearly as follows:

(a) the respondent was objecting to the delimitation proposals which it was constitutionally entitled to do under s 5 of the Thirteenth Schedule and which challenge was unprecedented; and

(b) there was a risk that if the local enquiries were completed and a report was submitted the whole process would become futile and the right to appeal would have to abate.

[5] The learned judge delivered an oral judgment holding that special circumstances existed to warrant a stay pending appeal on the following reasons:

> I am of the further view that once a report is submitted to the Prime Minister pursuant to the provisions of s 8 of the Thirteenth Schedule, the Courts in fact no longer have any jurisdiction as any position to the contrary would contravene the doctrine of separation of powers ... Once the report is submitted to the Prime Minister pursuant to s 8, the State of Selangor's appeal would be rendered nugatory. Against this, the interest of the Election Commission must be considered. The Election Commission has been established under the Federal Constitution with express functions provided for in the constitution. Any stay that is granted by the Court will result in a clog on its ability to perform its constitutional functions. Such clog however is a temporary one and the Election Commission has until September

> of 2018 to finish review exercise ... The competing interests of the parties must be considered in determining whether or not a stay ought to be granted in these circumstances. I am of the view that the balance of justice lies with the applicant in the present instance and for these reasons, for the reasons and because of the factors that I have explained ... the stay is in respect of the whole of the State of Selangor ... that the stay applies in respect of all local inquiries.

[6] What comes sharply into focus in this motion is whether the learned judge erred when His Lordship held that special circumstances existed to warrant a stay of all local enquiries in the State of Selangor pending an appeal which the respondent intended to file, and which it did actually file subsequently against the decision of His Lordship in dismissing the judicial review application.

[7] I shall, in my deliberation, begin by emphasising that learned counsel for the respondent presents her argument premised on s 44 of the Courts of Judicature Act 1964 ('Act 91') contending that there is no such thing as an interim setting aside of the stay order sought by the applicants in prayer 1 of the notice of motion. It is either this court sets it aside or affirms the High Court's stay order, learned counsel submits. The next point of relevance in her submission is that s 44 of Act 91 preserves the integrity of an appeal or other proceedings. Submitting that the court cannot interfere once the report is submitted by the commission to the Prime Minister, learned counsel drives home the point that the appeal would be rendered nugatory once the report is submitted to the Prime Minister.

[8] That lets in the argument much relied upon by the applicants, that is that, the commission cannot be prohibited from carrying out this particular constitutional function where its role is merely to formulate proposals that are advisory in nature after consulting the stakeholders listed in s 5 of the Thirteenth Schedule to the Federal Constitution. Further mention must also be made that the applicants in the course of their argument, lay stress on the constitutional scheme of the Thirteenth Schedule which clearly shows that the preparation of the report by the Commission comes after the completion of all local enquiries under ss 5 and 7 of the Thirteenth Schedule for all the States of Malaya. Such report which contains the commission's proposals are required by s 8 to be submitted to the Prime Minister to be laid before the House of Representatives pursuant to s 9, the authority that decides on the delimitation of constituencies. In view of this constitutional arrangement, it has been urged upon us that we must accept the proposition that the stay of the local enquiries is an act that interferes with or contravenes the doctrine of separation of powers as it is hindering a body, namely the commission, from carrying out its function for the House of Representatives.

[9] It is necessary to emphasise that the constitutional function affected by the stay order here is the convening of local enquiries in the State of Selangor. In the normal course of event, where the commission undertakes the exercise of delimitation of constituencies, upon completion of such enquiries, the commission is required to prepare and submit a report to the Prime Minister pursuant to s 8 of the Thirteenth Schedule who shall, in accordance with s 9, lay the report before the House of Representatives together with the draft of an order to be made under s 12 by the Yang di-Pertuan Agong. The House of Representatives, without question, is the ultimate authority that decides on the report and the draft order in accordance with s 10 of the Thirteenth Schedule. The stay order granted by the learned judge in the court below is very much closely akin to an injunction which in effect and substance operates to restrain or prohibit the commission from performing its constitutional functions. The stay order ought not to have been granted as ultimately, such order directly prevents the House of Representatives from receiving the report and making a decision thereon. The act of convening the local enquiries is not, in our judgment, a discretion conferred on the commission. It is in fact a mandatory requirement imposed on the commission by the clear and unambiguous stipulation of s 5 of the Thirteenth Schedule which is enacted in the following terms:

> 5 Where, on the publication of the notice under section 4 of a proposed recommendation of the Election Commission for the alteration of any constituencies, the Commission receive any representation objecting to the proposed recommendations from —
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> (a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or
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> (b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question,
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> *the Commission shall cause a local enquiry to be held in respect of those constituencies*. (Emphasis added.)

[10] The applicants, in their affidavit-in-support of the motion affirmed by none other than the Chairman of the Commission himself, states that there are a total of 111 local enquiries yet to be convened in Selangor.

[11] A consideration of the catenation of authorities confirms the view that has been expressed above. The courts in fact recognise the constitutional function of the commission in relation to the democratic process sets out in art 113 of the Federal Constitution and has consistently refused the granting of interim injunctions. This was decided in *Election Commission, Malaysia v Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716 and the Supreme Court there held:

> It is not that the court has no jurisdiction to hear an application of this nature but that the court must bear in mind that the Election Commission was performing its

A constitutional functions under the law. The election process is prescribed in the Constitution. The Election Commission is given a vital role in this democratic process.

... Therefore it is not a question of the court having no jurisdiction but that *the court should decline to exercise its jurisdiction so as not to hinder the democratic process*. (Emphasis added.)

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[12] Similarly, in its earlier decision, the Supreme Court in *Saman Gulam v Tan Sri Haji Mohd Sunoh Marso & Ors; Lau Pui Keong v Tan Sri Haji Mohd Sunoh Marso & Ors; Ahmad Bahrom bin Datuk Hj Abu Bakar Titingan v Tan Sri Haji Mohd Sunoh Marso & Ors* [1987] 2 MLJ 718 expressed the view that the commission performed its functions under the Federal Constitution which were clearly spelt out in art 113 thereof and held that the judge was correct in not granting the interlocutory injunction against the commission.

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[13] The position of bodies carrying out constitutional functions was considered again in *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149. In this case a tribunal had been set up under art 125(3) of the Federal Constitution to inquire into and make recommendations concerning the appellant to His Majesty the Yang di-Pertuan Agong. The Supreme Court made an ex parte order restraining the tribunal from submitting any recommendations, report or advice respecting the enquiry to His Majesty the Yang di-Pertuan Agong. The attorney general applied by motion to set aside the order. The Supreme Court at p 151 held:

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The functions of the tribunal appointed under art 125(3) of the Constitution *is to inquire and investigate on the representation and the report to the Yang di-Pertuan Agong with any recommendation it may take. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function*.

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Finally, the members of the tribunal are appointees of the Yang di-Pertuan Agong. From the language of art 125 it is clear that the Yang di- Pertuan Agong is entitled to the report of the tribunal. *To restrain the tribunal from submitting their report is in effect to restrain His Majesty from receiving the report*.

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On the above grounds it is our view that the restraining order is therefore bad in law, invalid and unenforceable as against the Yang di-Pertuan Agong and the tribunal. (Emphasis added.)

[14] Turning to the application in the present instance, the scheme of the Thirteenth Schedule manifestly shows that the Commission does not decide. It does no more that investigate or consult and make recommendations as it may have determined pursuant to art 113(2) of the Federal Constitution and ss 4 and 7 of the Thirteenth Schedule thereto in the report to be submitted to the Prime Minister. The commission is part of the entire and continuous process of

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the review of the division of the federation and states into constituencies under the Federal Constitution. It is in fact carrying out this task which it is mandatorily required to do under the Federal Constitution for the House of Representatives and it is a matter for the House of Representatives alone to determine whether to approve or otherwise reject the draft order laid before it together with the report by the Prime Minister. Needless to say, the report is not binding on anyone, not even the House of Representatives. What is apparent from this constitutional scheme is that the House of Representatives is the ultimate and proper authority for deciding on the delimitation of constituencies.

[15] Thus, an important point that has clearly emerged from this position is that when the stay order is granted by the learned judge, His Lordship does not seem to realise that, such stay order operates to restrain the commission from conducting the local enquiries and effectively prohibits the commission from taking any further step in the whole and continuous process of delimitation of constituencies. The subsequent steps affected by the stay order would be the submission of the report by the commission to the Prime Minister, who, as a natural consequence that follows, would be unable to submit the report as well as the draft order to the House of Representatives. Such inability undoubtedly prevents the House of Representatives from receiving and making a decision on the report and the draft order. That I think takes the case to a whole new dimension which relates to constitutional competence assigned to the courts under the separation of powers. The law in this regard must be taken to be well settled in that the decision of the House of Representatives, as the learned judge has also correctly acknowledged, is non-justiciable and beyond the touch of curial intervention and I shall not hesitate to hold that by extension, as the procedure of local inquiries is part of the continuous process of this constitutional exercise of decision making, it effectively inhibits any granting of an order of this nature against the commission and the court ought not interfere with the exercise of the constitution of function by the commission in this regard. This court in *Peguam Negara Malaysia v Chan Tsu Chong & Ors* [2018] 1 MLJ 409 and *M Kula Segaran dan satu lagi lwn Suruhanjaya Pilihan Raya Malaysia dan lain-lain* [2018] 4 MLJ 111 lay stress to the fact that the report which has no binding or legal effect is not amenable to judicial review. The stay order has plainly interfered with the exercise of the public duties or functions vested with the commission and the House of Representatives by the Federal Constitution. The law I would say, poses an insuperable obstacle in the way of the respondent and the learned judge ought to have regard to this trite legal position as any refusal to grant a stay in this case would also be consistent and in accordance with the inhibition imposed by the clear decided authorities in this country.

[16] As such, I cannot accept the argument urged upon this court by learned

counsel for the respondent that the learned High Court judge is right when His Lordship grants the stay upon the oral application made by the respondent. To my mind, there is a good deal of substance in the argument put forward by the learned senior federal counsel on the legal effect of the impugned stay order made by the learned judge. To quote the judgment of this court (which the learned judge in the court below failed to consider) in the case of *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656 at p 671:

> ... but the stay order had also effectively stayed all the process of delimitation of constituencies including local enquiries for the whole of the Federal Territory of Kuala Lumpur. The stay order had thus paralysed and would have stultifying effect on the EC in the exercise of its constitutional functions.

Coincidentally, the stay order in *Nurul Izzah*, was also made by the same judge who granted the stay order in the present case.

[17] In the case before this court, the next point of importance which the learned judge ought to have considered is the justice of the case. The learned judge, as it is clear to us, only takes into account the rights of the parties to the proceedings in this case. In my opinion, this is not a case of merely doing justice between the immediate parties to the proceedings. There is a wider interest of the democratic process, the doctrine of separation of powers and the parties that are concerned with the commission in carrying out its functions. The learned judge I need say, granted the stay order completely oblivious to the rights of the other states and electors in Peninsular Malaysia. This court is told that local enquiries in these states have been completed but the effect of the impugned stay order as earlier stated is to restrain the commission from preparing the report which it is required to do having completed the procedure prescribed in Part II of the Thirteenth Schedule which includes holding local enquiries. By ordering the stay, that really throws a spanner in the entire works of the delimitation of constituencies machinery.

[18] It is necessary to consider at this point the respondent's argument as the last remaining question in this judgment. For the respondent, learned counsel questions whether an interim order to set aside the stay order can be granted under s 44 of Act 91. The correct procedure, learned counsel submits, is to prosecute the appeal early. In my judgment, there is no legal impediment for this court to grant an interim order as prayed for in this motion pending the hearing of the appeal filed by the applicants. The undisputed fact is that the respondent has obtained the stay after the decision is made against it. This has effectively stayed the judgement of the court against the respondent. Thus, a question which immediately arises following the stay order made by the learned judge is whether the said order can be granted in the first place when the application for the judicial review has been refused by the court. With the dismissal of its application, the respondent in truth is left with absolutely

nothing to begin with. The respondent's position, viewed in the context of the trite legal position as clearly demonstrated above inhibiting any order that restrains the commission from carrying out its function which it is mandatorily required to perform by the Federal Constitution, certainly would not justify the granting of such stay order. As it has been made, it is manifestly impossible to allow it to remain, such order calls for or immediately requires curial intervention even if it is interim in nature while the case is pending appeal. It would suffice for the purpose of dealing with this issue for me to hold that following the dismissal of the judicial review application, the position of the commission so far as it concerns the exercise of its functions under the Federal Constitution remains unaffected as it would have been in if there is no judicial review application herein and the impugned order for stay. I would hold that it should remain that way until the disposal of the applicants' appeal. The status quo must be maintained and the Commission must be allowed to proceed to conduct local enquiries in Selangor unhindered until its completion. I do not think that anything material turns upon this argument. The motion is in my opinion properly brought within the scope of s 44 of Act 91.

[19] For the reasons earlier given, I have no hesitation in holding on the strength of these well recognised principles that the relief sought in prayer 1 of the notice of motion must inevitably be allowed. I make no order as to costs. My learned brother Yaacob Hj Md Sam JCA has read this judgment in draft and has expressed his agreement with it.

Order accordingly.

Reported by Afiq Mohamad Noor